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LUKMAN ZAINUDDIN

v.

PP

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HIGH COURT MALAYA, SHAH ALAM
NURCHAYA ARSHAD J
[CRIMINAL APPEAL: 42SA-260-2010]
18 SEPTEMBER 2012

C ***CRIMINAL LAW:*** *Penal Code - Section 414 - Concealment of stolen property - Conviction and sentence - Appeal against - Whether particulars as to time of offence proved - Typo errors in amended charge - Whether curable under s. 422 Criminal Procedure Code - Whether there was material contradiction between witnesses - Whether an accomplice a*
D *competent witness - Evidence Act 1950, s. 133 - Whether ownership of property returned to insurance company - Whether term of imprisonment reduced and fine enhanced*

CRIMINAL PROCEDURE: *Accomplice - Witness - Conviction based*
E *on uncorroborated testimony of accomplice - Whether accomplice a competent witness against an accused person - Whether accomplice implicated accused - Whether conviction illegal - Evidence Act 1950, s. 133*

The appellant was at the material time a legal officer attached at
F the Attorney General's Chambers. He was charged with an offence under s. 414 of the Penal Code and with an alternative charge under s. 109 of the same. Briefly, the facts were that in February 2003, SP8 had bought a BMW 3 series bearing registration number ADT 6677, insured to Kurnia Insurance
G (Malaysia) Berhad. On 12 August 2003, SP8, accompanied by the appellant, reported that the said car was stolen. Subsequently, SP8 filed a claim with the insurance company and was compensated RM62,000. On 24 May 2006, SP5 was approached by the appellant who instructed him to sell a BMW at RM7,000
H to a third party in Thailand. SP5 drove the car and was later detained at the Bukit Kayu Hitam Check Point by SP3. SP3 had made a search through KOMPOL (Komputer Polis) and discovered the said car had used a fake vehicle registration number RGN 6769. Further investigations revealed that the car was

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indeed the missing car. The appellant was later charged and convicted on the principal charge. He was sentenced to 12 months' imprisonment and a fine of RM2,000 in default three months' imprisonment. Thus, the appellant appealed. The grounds raised by the appellant herein were, (i) whether the particulars as to time of offence was proved; (ii) whether there was material contradiction between the evidence of SP5 and SP7; (iii) whether the conviction was safe based upon the evidence of an accomplice *ie*, SP5; (iv) whether the ownership of the car belonged to SP8 and (v) whether the sentence meted out was proportionate to the offence.

Held (reducing term of imprisonment to eight months; enhancing fine to RM20,000):

(1) The dates stated in the amended charge were *bona fide* typo errors. After SP5 had testified and showed that an offence had actually taken place on the dates mentioned, the Deputy Public Prosecutor made an oral application to amend the charge. An error of a date specified in the charge is without importance unless it is actually an essential part of the offence (*Law Kiat Lang v. PP*; *Ho Ming Siang v. PP;* refd). Hence, the typo error could be cured *via* s. 422 Criminal Procedure Code. The appellant had not been prejudiced or suffered any injustice. (paras 10-12)

(2) There were two versions between the evidence of SP5 and SP7. According to SP5, the appellant instructed him to sell the BMW. However, SP7 revealed that he had overheard the conversation between SP5 and the appellant and that SP5 had wished to borrow the BMW. To determine whether there were real contradictions among witnesses, the totality of the evidence had to be examined. The court had carefully scrutinised SP7's evidence it its entirety and found that SP7's evidence could not have benefited the appellant. During re-examination, SP7 confirmed that he did not hear any conversation between SP5 and the appellant, thus his evidence could not help the appellant. (paras 15 & 16)

(3) Section 133 of the Evidence Act 1950 provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon uncorroborated testimony of an accomplice.

A Further, in this case, the trial judge had not based her decision solely on SP5's evidence. The trial judge had pointed out that there were other evidence *ie*, direct and circumstantial, to link the appellant to the offence charge *ie*, the correspondence between SP5 and the appellant *via* SMS.
B The court had no reason to doubt the finding of the trial judge. There was no trace of evidence to even suggest that SP5 had the motive to lie or to implicate the appellant. (paras 18, 19 & 22)

C **(4)** The trial judge's finding that Kurnia Insurance now has the ownership of the BMW was consistent with the testimony of SP4 (the agent from the insurance company) and also SP9 (the financier's officer). After Kurnia Insurance made the payment of RM62,000 to Maybank, the ownership returned to
D the insurance company. (para 26)

(5) The appellant was a legal officer equipped with legal knowledge and skills. He is expected to uphold the law and not to abuse his position. Therefore, the court reduced the term of imprisonment to eight months and enhanced the fine
E to RM20,000. (para 28)

Case(s) referred to:
Ho Ming Siang v. PP [1966] 1 LNS 68 FC ***(refd)***
Law Kiat Lang v. PP [1965] 1 LNS 81 FC ***(refd)***
F *R v. Severo Dossi [1918] 13 Cr App R 158* ***(refd)***
Rattan Singh v. PP [1970] 1 LNS 132 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 162, 422
Evidence Act 1950, s. 133
G Penal Code, ss. 109, 414

For the appellant - Md Yunos Shariff (Nor Dalila Mohd Zambri with him); M/s Arman - Yunos
For the prosecution - Ishak Yusuff (Deepa Nair Thevaharan & Nadia Izhar with him); DPP

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Reported by Suhainah Wahiduddin

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JUDGMENT

Nurchaya Arshad J:

Introduction

[1] To begin with, the appellant at the material time was a legal officer attached at the Attorney General's Chambers. He was charged with an offence under s. 414 of the Penal Code and with an alternative charge under s. 109 of the Penal Code read together with s. 414 of the same Code. The relevant charges read as follows:

> Pertuduhan Pindaan:
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> Bahawa kamu antara jam 11 malam pada 24 Mac 2006 hingga jam 12.15 pagi pada 25 Mac 2006, di tempat letak kereta di Pangsapuri Putra Harmoni, Persint 9, Putrajaya, Wilayah Persekutuan, dengan sengaja telah menolong menghapuskan harta iaitu sebuah kereta BMW model 318i(A) bernombor pendaftaran ADT 6677, nombor enjin 184EI-08677685 dan nombor casis FJ2488 yang kamu ketahui sebagai harta curi, dan oleh yang demikian itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s. 414 Kanun Keseksaan.
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> Pertuduhan alternatif (pindaan):
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> Bahawa kamu pada 25 Mei 2006, jam lebih kurang 5.30 petang, di Pusat Pemeriksaan Bukit Kayu Hitam, dalam Daerah Kubang Pasu, negeri Kedah, Kumaranasu a/l Marimuthu (KP No. RF142467), dengan sengaja telah menolong menghapuskan harta iaitu sebuah kereta BMW model 318i(A) bernombor pendaftaran ADT 6677, nombor enjin 184EI-08677685 dan nombor casis FJ2488 yang kamu ketahui sebagai harta curi, dan bahawa kamu antara jam 11 malam pada 24 Mac 2006 hingga jam 12.15 pagi pada 25 Mac 2006, di tempat letak kereta di Pangsapuri Putra Harmoni, Persint 9, Putrajaya, Wilayah Persekutuan, telah bersubahat melakukan kesalahan tersebut telah dilakukan hasil persubahatan kamu dengan menghasut dan melibatkan diri dalam menjual harta curi itu, dan oleh yang demikian itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s. 414 Kanun Keseksaan.

The Brief Facts

[2] In February 2003, SP8 had bought a BMW 3 Series bearing the registration number ADT 6677. The said car was insured to Kurnia Insurance (Malaysia) Berhad from 2 Januari 2003 until 1 Januari 2004.

[3] On 12 August 2003, SP8 accompanied by the appellant, reported that the said car was stolen. Subsequently, SP8 filed a claim with the insurance company. Kurnia Insurance had compensated RM62,000 and the said amount was paid to Maybank, the loan financier.

[4] On 24 May 2006, SP5 was approached by the appellant, and the appellant instructed SP5 to sell a BMW at RM7,000 to a third party in Thailand. SP7 was also present when the meeting took place.

[5] SP5 drove the car and was later detained at Bukit Kayu Hitam check point by SP3. SP3 had made a search through KOMPOL (komputer polis) and discovered the said car had used a fake vehicle registration number RGN6769. Further investigation revealed that the car was indeed the missing car.

[6] The appellant was later charged and convicted on the principal charge. He was sentenced to 12 months imprisonment, and a fine of RM2,000 in default three months imprisonment.

Grounds Of Appeal

[7] Based upon the petition of appeal, the appellant raised 13 grounds, which could be summarized into the following issues:

(1) Whether the particulars as to time of the offence was proved;

(2) Whether there are material contradiction between the evidence of SP5 and SP7;

(3) Was the conviction safe based upon the evidence of an accomplice ie, SP5;

(4) Whether the ownership of the car belongs to SP8;

(5) Whether the sentence meted out was proportionate to the offence.

First Issue

[8] The appellant claimed that he was convicted on a charge which was not proved by the prosecution. According to the amended charge, the time of the offence was from 24 Mac 2006 (11pm) until 25 Mac 2006 (12.15am). However, no evidence was adduced to prove that an offence actually took place at the particular time and date. Therefore, the prosecution's case must necessarily fail.

[9] The learned Deputy Public Prosecutor, in his written submission, contended that it was indeed a *bona fide* typo error. Furthermore, SP5's evidence clearly showed that an offence actually took place on 24 May 2006 (11pm) until 25 May 2006 (12.15am).

[10] After having perused the Appeal Record, the court is satisfied that the dates stated in the amended charge (encl. B) were indeed *bona fide* typo errors. After SP5 has testified, the learned Deputy Public Prosecutor made an oral application to amend the charge to insert the following words:

> kamu pada 24 Mei 2006 antara jam lebih kurang 11 malam sehingga 12.15 pagi bertarikh 25 Mei 2006 (p. 469, Appeal Record).

[11] Having said that, the court also referred to s. 153 of the Criminal Procedure Code and the relevant authorities. The cases of *R v. Severo Dossi* [1918] 13 Cr App R 158, *Law Kiat Lang v. PP* [1965] 1 LNS 81 (FC), *Ho Ming Siang v. PP* [1966] 1 LNS 68 (FC), decided that an error of a date specified in the charge was without importance, unless it is actually an essential part of the offence.

[12] Hence, the above typo error could be cured *via* s. 422 of the Criminal Procedure Code. The appellant had not at all be prejudiced of suffered any injustice. The amendment made was consistent with SP5's evidence. However, the appellant *via* his counsel decided to waive his right under s. 162 of the Criminal Procedure Code by not recalling prosecution witnesses especially SP5 (Appeal Record, p. 482). Furthermore, there was no dispute in the appellant's evidence in defence, that he met SP5 on those particular dates ie, from 24 May 2006 until 25 May 2006 (Appeal Record, pp. 497, 512, and 517).

[13] Based upon the above reasons, the first issue raised by the appellant was without merits.

Second Issue

[14] Learned counsel also submitted that there are two versions between the evidence of SP5 and SP7. According to SP5, the appellant instructed him to sell the BMW at the price of RM700. However, SP7 revealed that he over-heard the conversation between SP5 and the appellant that SP5 wished to borrow the

A BMW. Learned counsel submitted that this amounted to a material contradiction and was detrimental to the prosecution's case. According to learned counsel, when there exist two versions, the one which is favourable to the accused should be accepted. Learned counsel submitted that SP7's evidence was consistent
B with the defence advanced by the appellant that he only intended to lend the BMW to SP5, but not to instruct SP5 to dispose the stolen property.

[15] With all due respect, learned counsel's interpretation of the
C witnesses' evidence were being taken out of its proper context. To determine whether there were real contradictions among witnesses, the totality of the evidence has to be examined. The court has carefully scrutinized SP7's in its entirety, taking into consideration his evidence during examination-in-chief, cross-examination and re-
D examination, the court finds that SP7's evidence could not have benefited the appellant. During re-examination, SP7 confirmed that he did not hear any conversation between SP5 and the appellant. SP7's evidence will not help the appellant as he confirmed that he was not aware as to what took place between the appellant and
E SP5 (Appeal Record, p. 344).

[16] The law recognised that a total consistency between witnesses in any case was nearly impossible. Discrepancies are likely to arise due to human fallibility. Therefore, the second complain mounted by the learned counsel is of no merits.
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Third Issue

[17] Learned counsel also submitted that the conviction was not safe as it was based upon uncorroborated evidence by an
G accomplice, ie, SP5.

[18] Section 133 of the Evidence Act 1950 provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because its proceeds upon uncorroborated testimony of an accomplice.
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[19] It is settled law that a conviction based upon uncorroborated evidence is good and safe as they are competent witnesses, but a warning should be given in relying on the uncorroborated evidence of an accomplice.
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[20] In the case of *Rattan Singh v. PP* [1970] 1 LNS 132, the court held that:

> In the current appeal, the learned Sessions Court Judge had rightly cautioned herself in dealing with evidence of an accomplice. The learned Sessions Court Judge had conformed to the rule of prudence in given warning to herself in dealing with the evidence of an accomplice as evidence in her ground of judgment at p. 698-699.

[21] In this case, the learned trial judge ruled that SP5 was indeed an accomplice. She also warned herself as to the danger of convicting the appellant in reliance of evidence by an accomplice. The court also finds that she did not base her decision solely on SP5's evidence. The learned judge also pointed out that there are other evidence, ie, direct and circumstantial, to link the appellant to the offence charge; for example: the learned trial judge noted that correspondence between SP5 and the appellant *via* SMSs (exh. P1 6A-C).

[22] In this case, SP5 never at any time demonstrated that he was lying. The court has no reason to doubt the finding of the learned trial judge especially when she had the audio visual benefit as to the demeanour of the witness. In fact, SP5 unhesitantly admitted that there was a pending criminal trial against him. This fact speaks volumes to his credibility. Furthermore, there was no trace of evidence to even suggest that SP5 has motive to lie or to implicate the appellant.

[23] Therefore, this issue is also without merit.

Fourth Issue

[24] Learned counsel also contended that the learned trial judge was wrong in finding that Kurnia Insurance now has the ownership of the BMW. According to learned counsel, SP8 is the rightful owner of the car.

[25] The court also finds no merit in this issue. The learned trial judge's finding was consistent with the testimony of SP4 (the agent from the insurance company) and also SP9 (the financier's officer). SP4 testified that after Kurnia Insurance made the payment of RM62,000 to Maybank, the ownership shall be returned to the insurance company (Appeal Record, p. 161). SP9 also confirmed the same fact (Appeal Record, p. 390).

[26] The appellant contended that there was a doubt as to this fact because according to SP10, the Road Transport Department, Maybank still retains the ownership of the car. The court finds this does not affect the prosecution's case. Both SP4 and SP9 had explained that they had not made the necessary changes with the Road Transport Department. SP9 further confirms that the bank has no further claims towards the car.

Fifth Issue

[27] The appellant contended that the sentence meted out was too harsh.

[28] It is trite law that the court hearing the appeal should be slow to disturb the sentence unless it is illegal, or grossly inadequate or manifestly excessive. In this case, the appellant was a legal officer equipped with legal knowledge and skills. He is expected to uphold the law and not to abuse his position. Therefore, the court will reduce the term of imprisonment to eight months, and enhance the fine to RM20,000.